

**IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
SEVENTEENTH DIVISION**

BEN MOTAL

PLAINTIFF

V.

CASE NO. 60CV-19-184

CITY OF LITTLE ROCK

DEFENDANT

**BRIEF IN SUPPORT OF CITY'S MOTION TO DISMISS
PURSUANT TO ARK. R. CIV. P. 12(b)(6)**

Comes now, the City of Little Rock, by and through his attorneys, Tom Carpenter, City Attorney, and Andrew Middlebrooks, Assistant City Attorney, and for its Brief in Support of City's Motion to Dismiss pursuant to Ark. R. Civ. P. 12(b)(6) states:

I. INTRODUCTION AND FACTUAL BACKGROUND

Plaintiff, Ben Motal, filed a complaint on January 11, 2019. In his complaint, he alleges that he was the victim of a hit-and-run accident on October 27, 2018, and a report was created for the incident. He further alleges that at some point, presumably following October 27, 2018 but prior to the filing of his complaint, he visited the Little Rock Police Department headquarters in order to obtain a report. While at the Little Rock Police Department, he alleges that he was allowed to view the report, but that he was told that he was unable to take photographs of the report with his cellphone, but that he could receive a copy of the report for \$10.

II. STANDARD OF REVIEW

The Arkansas Rules of Civil Procedure require that a complaint "contain a statement in ordinary and concise language... is entitled to relief." Ark. R. Civ. P. 8(a)(1). It is well established that a complaint should be dismissed if it fails to state a claim upon which relief can be granted.

Ark. R. Civ. P. 12(b)(6). Arkansas has adopted a clear standard that facts must be plead which set forth a claim in which relief can be granted. *Ballard Grp. Inc. v. BP Lubricants USA, Inc.*, 2014 Ark 276, 6, 436 S.W. 3d 445, 449 (2014). When ruling on a motion to dismiss, the court must accept the allegations contained in the complaint as true and all reasonable inferences from the complaint must be drawn in favor of the Plaintiff. *Neal v. Wilson*, 316 Ark. 588, 873 S.W. 2d 552 (1994). In deciding whether to grant a dismissal motion the circuit court must look only to the allegations in the complaint. *Id.* at 596. In order to state a cause of action, the complaint must allege facts, not mere conclusions. *Hollingsworth v. First Nat'l Bank & trust Co.*, 311 Ark. 637, 846 S.W. 2d 176 (1993). “Arkansas is a fact-pleading state, and this court looks to the underlying facts supporting an alleged cause of action to determine whether the matter has been sufficiently plead.” *Panhandle Oil and Gas Inc. v. BHP Billiton Petroleum (Fayetteville), LLC.*, 2017 Ark. App. 201, 6-7, 520 S.W. 3d 277, 282 (2017)(citing *Brown v. Tucker*, 330 Ark 435, 954 S.W. 2d 262 (1997)).

III. ARGUMENT

A. There is a specifically enacted exception to Ark. Code Ann. § 25-19-105 that dictates the costs of accident reports.

Under the Arkansas Freedom of Information Act (“FOIA”) as codified in Ark. Code Ann. § 25-19-105(a)(1)(A) it states “except as otherwise specifically provided by this section or *by laws specifically enacted to provide otherwise*, all public records shall be open to inspection and copying by any citizen of the State of Arkansas during the regular business hours of the custodian

of the records.” (Emphasis added). The legislature has created a law that specifically provides for a set fee for copies of accident reports. *See* Ark. Code Ann. § 27-53-210(b)(1). It provides that “in order to partially reimburse the Department of Arkansas State Police for the cost of making photostatic or written copies of motor vehicle accident reports and copies of records of traffic violations, there shall be charged a fee of ten dollars (\$10.00) for each copy of a basic accident report and a fee of one dollar fifty cents (\$1.50) per page for each copy of a supplemental report.” *Id.*

Since the legislature has mandated a fee for the copying of motor vehicle accident reports, the City can charge said fee for copies of the report without violating FOIA. Further, FOIA, specifically allows pre-emption for actual costs of production by stating, “Except as provided in § 25-19-109 *or by law*, any fee for copies shall not exceed the actual costs of reproduction...” (Emphasis added). Therefore, FOIA does not apply, because another law has been enacted to levy the cost of production to be \$10 for an accident reports.

B. Plaintiff does not allege that he made a Freedom of Information Act request.

There is no allegation in the Complaint that the Plaintiff made any mention of FOIA. While the complaint states “he advised Ms. Tate of his right to copy the report with his own device,” this allegation does not specifically address whether or not Mr. Motal made any mention of FOIA nor could any of his actions be interpreted that any FOIA request was made and as such his complaint should be dismissed. *See* Plaintiff’s Complaint ¶ 9.

Further, Mr. Motal alleges a right to take pictures with his cellphone and no such right has been enumerated under FOIA that could give any type of reasonable notice to a City employee of Mr. Motal's subjective belief that he was referencing FOIA. At no point in the complaint does Mr. Motal allege that he made a FOIA request at all, or that he made the City of Little Rock aware of his intent to make a FOIA request.

It is also not stated when his conversation took place. It could have been day or night, weekday or weekend. Ark. Code Ann. § 25-19-105(a)(1)(A) requires that a request for records be made during regular business hours to even apply. The Plaintiff fails to plead sufficient facts to give notice to the Court or the City when his allegations took place with any reasonable certainty. The Complaint is missing a necessary fact that must be known before a court could grant relief.

C. Plaintiff does not allege that he identified himself as an Arkansas citizen without felony convictions.

Ark. Code Ann. § 25-19-105(a)(1)(A) further states that public records are open to "any citizen of the State of Arkansas." Even if Mr. Motal did sufficiently inform the City of his intent to make a FOIA request, the Complaint does not allege that he identified himself as an Arkansas citizen without any felony convictions, other factors that must be considered and pled for a court to grant relief.

IV. CONCLUSION

The Complaint fails to allege several facts that are key elements of the cause of action. Mr. Motal does not factually allege that he made a request under FOIA or provide any factual evidence

where one can reasonably conclude that any FOIA request was made, but instead offers it as a mere conclusion that it was a request under FOIA. Furthermore, the legislature has specifically mandated that a fee be charged for copies of accident reports in Ark. Code Ann. 27-53-210(b)(1), which creates an exception or preemption to FOIA. Ark. Code Ann. § 25-19-10. Therefore, this case should be dismissed with prejudice pursuant to Ark. R. Civ. P. 12(b)(6).

Respectfully submitted,

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City Attorney

/s/ Andrew Middlebrooks

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CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2019, I electronically filed the foregoing with the Clerk of Court using the eFlex Electronic Filing System, which shall send notification of such filing to Ben Motal at the email address of ben@motallaw.com.

/s/ Andrew Middlebrooks

Andrew Middlebrooks